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March 15, 2021

Honorable Rep. Karin Power, Chair
House Subcommittee on Civil Law
900 Court St. NE,
Salem, Oregon 97301

RE: Written Testimony in Support of HB 2204

Dear Chair Power,

Below, please find my written comment in support of HB 2204 in the 2021 Legislative Session

Good afternoon Chair Powers and members of this esteemed subcommittee,

My name is Juan C. Chavez, and I am testifying on behalf of the Oregon Justice Resource Center in support of HB 2204. My testimony today is based on experience litigating civil rights cases on behalf of harmed community members. This bill is necessary because the federal courts have too often failed the public in seeking accountability for having been hurt by government actors. HB 2204 will allow people harmed by law enforcement officers to seek recourse from a jury of their own peers, and have accountability based on the facts of the case rather than the judge-created doctrine of Qualified Immunity which prevents the courts from ever hearing the facts of the case. Qualified immunity provides a destructive, impractical, and profoundly chilling gate keeping function that sustains bad conduct and law enforcement violence and prevents the full realization of rights and liberties enshrined in our state and federal Constitutions.

The Supreme Court first announced the existence of this qualified immunity to a civil rights lawsuit in the case *Pierson v. Ray*, 386 U.S. 547 (1967). In *Pierson*, the Court invented this doctrine to protect the officers who falsely arrested the Freedom Riders in a Jackson, Mississippi bus terminal. *Id.* at 552. The officers who arrested Reverend Pierson and the other riders had concocted fantastical reasons to justify these arrests. *Id.* at 553. The Court did not find

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these credible. *Id.* at 557. Nevertheless, the Court believed that it was unfair at that time to allow a lawsuit against the officers because they may not have known that what they were doing—upholding white supremacy and segregation—would be deemed unconstitutional later, and should be allowed to argue this defense in future cases. *Id.* at 555. And so, qualified immunity was let loose, and has grown to become a scourge against our rights.

Since *Pierson*, qualified immunity has become even more onerous and more harmful to the development of civil rights in the United States. It requires that a Plaintiff demonstrate, typically at a very early stage in litigation when not all facts have been acquired, not only that the officer in question violated a constitutional right, but also that the officer had notice of the "clearly established" rights that was violated. The latter requirement—the "clearly established" law component—is where these cases often fail. One would imagine that if a court is concerned about officers having notice about "clearly established" rights, they would then announce what the law is. However, that is not the case, and the Supreme Court has allowed federal district courts to dismiss cases on the "clearly established" test without announcing whether the case in front of them, in fact, violates the law. *Pearson v. Callahan*, 555 U.S. 223 (2009). And that is why so many advocates from both major parties have called for Qualified Immunity to be abolished.

Now, if you're thinking that qualified immunity protects officers from having to second guess their work, allow me to paraphrase some of the scholarship on this issue. First, officers simply do not think about case law when doing their job; they think about their training and the bedrock constitutional cases that underpin it, like *Graham v. Connor*. Ask any officer under oath what they used to justify their use of force, and they will say their training and the *Graham*

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factors. None of them will say *City of Escondido v. Emmons* or any other obscure Ninth Circuit case. That officers follow or heed notice of case developments is what scholar Joanna Schwartz calls Qualified Immunity's "Boldest Lie." Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. Chi. L. Rev. (Forthcoming 2021).[1] Second, if you're thinking that qualified immunity protects officers from costly litigation that too is a misconception. Officers, while named in person in the lawsuit because § 1983 requires so, are rarely not indemnified by their employers, who not only pay the proceeds but hire the lawyers to defend them. Also, more often than not, according a study, again by scholar Joanna Schwartz, qualified immunity is actually not granted in full in the vast majority of cases. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 60–61 (2017).[2] According to her survey of six jurisdictions, qualified immunity was only granted in full in 14% of cases. So the government would have to regardless engage in discovery and litigation.

Why then is qualified immunity still a problem if it's not granted in full? Simple: it grinds plaintiffs down and subjects them to some of the lengthiest and complicated briefings in cases that otherwise could be considered simple batteries or assaults. It's a sign that the government can and will use every lever at its disposal to avoid ever having to be held to account, contrary to the laws of our country. Qualified immunity is cost-prohibitive and time-intensive for Plaintiffs.

HB 2204 provides a new way forward. With it, litigants can use Oregon law and Oregon courts to resolve these questions without having to engage in costly and useless motions

[1] The paper is electronically available here: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3659540
[2] The paper is electronically available here: https://www.yalelawjournal.org/article/how-qualified-immunity-fails

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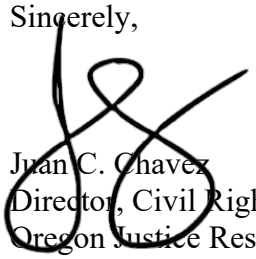
practices. It allows juries of one's peers to decide matters of local concern. Please support this bill, and I am available for any questions you might have. Thank you.

Sincerely,



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